IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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JUDGMENT

Akha Ram
vs
State of Rajasthan.

S.B. CR. APPEAL NO.207/1988 AGAISNT THE JUDGMENT DATED 5.5.1988 PASSED BY SHRI BRIJLAL BUNDEL, RHJS, ADDL. DISTRICT & SESSIONS JUDGE, BARMER IN SESSIONS CASE NO.15/1988.

DATE OF ORDER : 20th November, 2006

PRESENT
HON'BLE MR.MOHAMMAD RAFIQ,J.

REPORTABLE

Mr.P.Solanki, Advocate, for the petitioners.
Mr.Rameshwar Dave, Public Prosecutor.

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BY THE COURT: -

This appeal is directed against the judgment dated 5th May, 1988 passed by the Addl. District & Sessions Judge, Barmer whereby the accused appellant was convicted under

Section 18 of the NDPS Act, 1985 and sentenced to undergo RI for 10 years with a fine of Rs.1 lac and in default of payment of fine, to further undergo simple imprisonment of three months.

Briefly stated facts of the case are that when on 14.7.1987, SHO, Police Station, Bijrad on receiving an information proceeded to the residence of Hemaram S/o Idanram Jat, resident of Shobhala Ki Dhani, a person from the Dhani having been seen the police party, who were in uniform tried to run away from Dhani of Hemaram. He was intercepted by the police party and asked to disclose his name. He mentioned his name was Aharam S/o Shri Bagaram Jat, resident of Shobhala Ki Dhani. When he was asked to give the reason why he wanted to run away, he stated that he was in possession of opium. Constable Jogendra Singh thereupon called Heeralal and Champaram as Motbir and asked Ajaram in their presence about the opium. He from his Tevte ki kut (an silver ornament, which is hollow from inside-which the men wear around neck) took a white polythene packet. When this packet was opened it was found to contain a black substance.

On smelling and testing this was discovered as opium. When Akharam was asked to produce the licence, he could not produce the same. On weighing the opium the same was found to be 400 grams, out of which, 30 grams was separated in a small cotton bag and remaining opium was also separated in the another cotton bag. Akharam was arrested and regular case against him for offence under Sections 17 and 18 of the NDPS Act was registered. On completion of investigation, challan was filed against him under Sections 17 and 18 of the NDPS Act.

The prosecution examined as many as 9 witnesses in support of its case. The defence did not examine any witness. After conclusion of trial, the learned Addl. District & Sessions Judge, Barmer by his judgment finally convicted and sentenced the accused appellant as indicated above, hence, this appeal.

I have heard learned counsel for the parties.

Shri P. Solanki, learned counsel for the appellant while

assailing the judgment passed by the learned trial court argued that the learned trial judge erred in holding the accused-appellant guilty for the offence under Section 18 of the NDPS Act, 1985. The learned trial court has committed an error in relying on the testimony of the police officials PW-3 Joginder Singh, PW-4 Narain Singh and PW-7 Om Kumar. None of the independent witnesses supported the case of the prosecution. The Motbir PW-2 Chokha Ram and PW-8 Hiralal have both not supported the story putforward by the PW-7 Om Kumar, SHO. It has been argued that conviction is solely based on the testimony of the police personnels and there are material contradictions in the statements of police officials. The story disclosed by these witnesses does not appear to be natural and concocted one. It could not be believed that the accused appellant while running away from the Dhani of Hemaram would keep in his possession the opium. Firstly, there was no necessity for the appellant to run away from the Dhani of Hemaram and secondly, even if he wanted to escape from the clutches of the police then he would not have kept in his possession the incriminating article which is alleged to be

opium by the prosecution. It has been argued that police in fact, has recovered the alleged opium of the Dhani of Hemaram, but has falsely implicated the accused appellant by concocting the case. The conduct of the SHO, Om Prakash PW-7 was unnatural inasmuch as he has not cared to search the Dhani of Hemaram though on the basis of alleged source information, he had proceeded to such Dhani. It has been argued that since SHO, PW-7 Om Kumar is the author of the FIR, therefore, investigation by him was against the principle of natural justice and this is prejudice against the appellant.

Shir P.Singh, learned counsel for the appellant argued that mandatory provisions contained in Section 57 of the NDPS Act has not been followed by the prosecution. Besides this, Section 50 of the NDPS Act has also been violated as the PW-7 Om Kumar SHO has not asked the appellant that as to whether he requires his search to be conducted in the presence of nearest Gazetted Officer of the Police Department or the nearest Magistrate. It has also been argued that the mandatory provisions of Section 42 of the NDPS Act has not

been complied with as the PW-7 Om Kumar, SHO, has not sent a copy of the information taken down in writing or the grounds for his belief under the proviso of Section 42 to his immediate superior officials. The prosecution has failed to prove that the sample taken in the present case reached safely in sealed condition to the chemical examiner. The statement of PW-6 constable Hukum Singh in this connection cannot be believed. The report of the Chemical examiner therefore was liable to be ignored. Learned counsel for the appellant has relied upon the judgment of this court in Malkit Singh @ Kala VS. State of Rajasthan reported in 2004(1) R.Cr.D. 102 (Raj) 102.

On the other hand, Shri Rameshwar Dave, learned Public Prosecutor has argued that the learned trial court has correctly recorded the finding of conviction against the accused appellant. Even if the motbir witnesses PW-2 Chokha Ram and PW-8 Hiralal were declared hostile, there are very many other witnesses of prosecution who have conclusively proved the charge against the accused appellant. He has in particular cited the statements of PW-3 Joginder Singh, PW-4 Narayan

Singh and PW-7 Om Kumar, SHO, who were present at the place when the recovery was made from the accused appellant. He has argued that the contraband opium remained in sealed cover throughout. The fact that the contraband article which was in sealed condition in Malkhana is proved from the statement of PW-9 Bhur Singh, who prepared letter dated 16th July, 1987 for its delivery to Superintendent of Police, Barmer and gave the letter alongwith packet to constable Khemaram. The constable Khemaram has been examined as PW-1 who has proved the deposit of the contraband article in sealed condition in the office of Superintendent of Police, Barmer alongwith letter Ex.P/3. He has also stated that he obtained a receipt and handed over the same to PW-5 Jeth Singh. Jeth Singh has also been examined as PW-5 and he in his statement approved the letter Ex.P/3, the packet was forwarded to FSL and handed over to Hukum Singh on 17th July, 1987. He has argued that there was no violation of Section 42 or Section 50 or even Section 57 of the Act of NDPS Act. Shri Rameshwar Dave, learned Public Prosecutor has relied upon the judgments of the Hon'ble

Supreme Court in (i) State of Rajasthan VS. Daulat Ram reported in 2005(2) WLC (SC) Crminal 475, (ii) State of Orissa VS. Rajendra Tripathy & Ors reported in 2005(2) WLC (SC) Criminal 135, (iii) Sajan Abraham Vs. State of Kerla reported in 2001 Cr.L.R. (SC) 504 and (iv) Khet Singh Vs. Union of India reported in 2002 Cr.L.R. (SC) 359, which will be discussed at the appropriate stage.

I have given my thoughtful consideration to the arguments advanced by learned counsel for the parties and examined the record.

PW-3, Joginder Singh, who accompanied the police party to the Dhani of Hemaram has stated that Narayan Singh and Mag Singh were also there. When they reached near Dhani of Hemaram, they saw that one person has come out from the Dhani and they caught hold of the running person and asked him why he was running. He then stated that he had opium. Motbirs were called for and in their presence the accused appellant stated that he had opium in his Tevte Ki Kut. On

weighing this article it was found to be 400 grms out of which 30 grams was taken out as sample and remaining quantity was sealed in a polythene bag. PW-4 Narayan Singh also stated the same facts in his statement. PW-7 Om Kumar who was investigating officer has also given the same version of the incident. He has proved the recovery memo Ex.P/5, arrest memo Ex.P/6, site plan Ex/P-7 and FIR Ex.P/10 and so many other documents. PW-1 Khemaram has stated that Bhraram had given packet on 17.7.1986 for delivering the same to the Superintendent of Police, Barmer and obtained a receipt from the office of Superintendent of Police. He has stated that the packet was in a sealed condition. PW-2 Jethu Singh has also corroborated this fact and stated that he prepared a forwarding letter for delivery of the packet in the FSL, Jaipur, which is Ex.P/3 and this letter was given to PW-6 Hukum Singh, Head Constable. PW-6 Hukum Singh in his statement has stated that he reached Jaipur at 2.00 PM on 18th July, 1987 and after 2.00 PM, the packet could not be deposited with the FSL because they did not accept such articles after 2.00 PM. He has stated that 19th July, 1987 being Sunday was holiday, he could not

deposit the same and on the following day i.e., on 20th July, 1987, he has deposited the same with FSL. The report of FSL is Ex.P/12 according to which this packet was received in sealed cover and was containing opium.

In the case of Dault Singh, cited supra by learned Public Prosecutor, their Lordships held that search of bag carried by accused on hand does not amount to search of person and Section 50 shall not be attracted to such a case. It was held that compelling a person to be searched does not amount to confession. In the case of Rajendra Tripathey, cited supra, their Lordships held when the accused is searched and detained by officers on patrolling duty, Section 42 would not be attracted. The Hon'ble Supreme Court noted that there was clear evidence that the accused did not choose to be searched by any person other than PW-5, S.I. Of Excise. The argument with regard to non-compliance of Section 50 of the NDPS Act was rejected and the judgment of the High Court was quashed and conviction was restored. In the case of Khet Singh, cited supra, the Inspector of the Customs Department, Jaisalmer

alongwith the Superintendent of Customs and two other constables was proceeding on patrolling and checking duty and they started checking several motor vehicles as it was suspected that there might be drug trafficking. The appellant was found sitting with a cloth basket in his hand. During search, a polythene bag was found in the basket with contained some black substance suspected to be opium. The appellant alongwith other others were brought to the office of the Customs. In the office of the customs, the opium was seized, samples were taken from it and were sealed. The appellant stated that he has purchased the seized opium from Kanhiayalal. The samples were sent for chemical examination and the report from the Forensic Science Laboratory revealed that the sample was 'opium'. An argument was raised that the search and seizure was effected near Brahamsar crossing no mahazar was prepared and no samples were taken from the contraband articles; the seizure memo was prepared in the office of the customs department and the samples were also taken at the office of the customs departments, and that this has caused serious prejudice to the appellant. The Hon'ble

Supreme Court rejected the arguments and upheld the conviction of the accused.

In the case of Daulat Singh (supra) cited by learned Public Prosecutor their Lordships of the Hon'ble Supreme Court held that such a bag carried by accused in his hand does not amount to search of the person and therefore Section 50 of the NDPS Act in that case would not be applicable. In this case however the Section 50 of the NDPS Act does apply because the opium in the present case was recovered from Tevte Ki Kut. When it was recovered from the Tevte Ki Kut from the accused it cannot be said that it was not recovered from his person. The other case citied by learned Public Prosecution is Rajendra Tripathi wherein the police party was on petrolling duty happens to search the accused. In that case an argument was raised that the compliance of Section 42 of the NDPS Act cannot be insisted in such a case but the same was not accepted by the High Court. The Hon'ble Supreme Court while reversing judgment of the High Court thereby restoring the conviction recorded by the trial court. In yet another

judgment cited by learned Public Prosecutor in Khet Singh (supra) was also with regard to non-compliance of Section 42 (1) of the NDPS Act wherein the Inspector of Personnel Department and certain other officials while on petrolling duty found the accused sitting in a motor vehicle with suspicious circumstances having a cloth basket in his hand, who was searched and found with opium. The Hon'ble Supreme Court upheld the conviction of the accused. Those judgments in my considered opinion cannot be applied to facts of the present case.

What I find in the present case is that the prosecution has not led any evidence as to compliance of Section 42(1) of the NDPS Act. When it is admitted case of the prosecution that the police party proceeded to Dhani on the basis of source information, it cannot be said to be a case of chance recovery while they were on patrolling duty and therefore all those judgments which learned Public Prosecutor has relied upon are of no help to him. PW-7 Om Kumar who was SHO of Police Station, Bijran received a source information at 11.00 AM on

14.7.1987 that accused Akharam was involved in the drug traffling and had gone to Sobhala Ki Dhani for such deal. When they reached there they saw one person coming out of the Dhani of Hemaram. He on seeing them started running. The police personnels followed him and asked as to why he was running, he thereupon stated that he was having opium. PW-3 Jog Singh constable of the same police station has given the version of the incident in his own manner. He has also stated that on seeing of the police personnels, the person coming out from the Dhani of Hemaram started running and on being intercepted and asked as to why he was running, he told that he was having opium. Thereafter, Motbirs were summoned and were asked to disclose where was the opium. He thereupon informed that this was tied to his Tevte Ki Kut. PW-4 Narayan Singh, who was also a constable in the said police station and accompanied with the police party to the place of recovery has given the version of the incident in his own manner. He has stated that they reached near Dhani of Hemaram and they saw one person started running from there. They caught hold him and asked him to disclose his identity,

then he told his name as Akharam and Mobirs were called and in the presence of Motbirs, he disclosed that he was having opium which was concealed in his Tevte Ki Kut. Now if the statements of three witnesses are read together it would be clear that while PW-3 and 7 says that the accused on seeing them come to the Dhani started running and they followed him and then asked about his identity and that as to why he was running, he told that he was running because he was having opium. It was thereafter Motbirs were called and in their presence his search was taken. In contrast PW-7 Narayan Singh stated that they saw the accused running when they reached near the Dhani of Hemaram. They followed him and they caught hold of him and at this stage the accused stated that he was having opium. In cross-examination however Narayan Singh states that when they called him, he stopped running and on being asked, he told that he was having opium concealed in his Tevte Ki Kut. The statement of all these witnesses, if carefully read, would make it evident that nothing has been stated either by the SHO or any of the witnesses with regard to compliance of sub-sections (1) and (2) of Section 42

of the NDPS Act. No evidence has been brought on record as to from whom the secret information was received by the SHO and as to if the SHO has reduced the same in writing and whether he conveyed it to his superior authorities. No explanation has been given as to why the secret information which was received at 11.00 AM in the day was not reduced in writing and why information of the same was not sent to the superior officers. No warrant of search was obtained under Section 41 nor reasons were recorded under Section 42 of the NDPS Act. While PW-7 and PW-3 have stated that when they followed and asked the accused the reason as to why he was running he told that he was having opium and after that Motbirs were called for and then he was asked to disclose where the opium was and there and then he stated that it was concealed in his Tevte Ki Kut. PW-4 Narayan Singh has given different version of the story and he has stated that the accused disclosed that he was having opium when he was caught. In other words, he means to say that the accused told them that he was having opium only after he had been caught hold. Even if that contradiction may not be fatal to the case of

the prosecution, what is however significant to note is that the none of the witnesses including SHO has disclosed as to if any attempt was made for making compliance of Section 42(2) of the NDPS Act.

Section 50 of the NDPS Act inter alia provides that where any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42, or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer to any of the departments mentioned in Section 42 or to the nearest Magistrate. In the facts of the present case when both the witnesses have turned hostile and compliance of Section 42 of the NDPS Act has not been made, the accused was required to be made aware of his right under Section 50 of the NDPS Act. None of the witnesses however have stated that the accused was informed about his right in any manner. The statement of prosecution witnesses when they state that accused was followed and intercepted and upon being asked as to why he was running, he disclosed that he was running

because he was having opium and then he was made to halt for some time till the summoned Motbirs arrived and then thereafter his search was taken and in that too, he voluntarily disclosed that he was having opium concealed in Tevte Ki Kut, hardly inspire any confidence as to compliance of the safeguards provided in the Act. In those facts non-compliance of Section 41, 42 as also 50 of the Act would be fatal to the case of the prosecution.

It is needless to mention say that if an accused is charged for an offence under the NDPS Act, he may have to suffer severe penalties and it is therefore that the court have been insisting upon strict compliance of mandatory provisions of various provisions in the said Act having inbuilt safeguards. On detailed analysis of evidence of the present case, I find that the prosecution has failed to prove the compliance of not only Section 41, 42 but also Section 50 of the NDPS Act. It has therefore failed to prove the charges beyond reasonable doubt against the accused, thus, entitling him to the benefit of doubt.

In the result, the present appeal succeeds. The conviction and sentence passed by the trial court is set aside and he is acquitted of the charges. His bail bonds and sureties are ordered to be discharged.

(MOHAMMAD RAFIQ), J.

c.p.goyal/-